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IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION
CASE NO. 00-3030 CA 11

GAIL ROUTH,
Plaintiff,
vs.
PHILIP MORRIS INCORPORATED,
("PHILIP MORRIS U.S.A."),
et al.,
Defendants.
_____/

Miami-Dade County Courthouse
Miami, Florida
October 2nd, 2003
Thursday, 1:13 p.m.

TRIAL - VOLUME 13

The above-styled cause came on for trial before the Honorable Herbert Stettin, Circuit Judge, pursuant to notice.

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APPEARANCES:

ANGONES, HUNTER, McCLURE, LYNCH & WILLIAMS
BY: Steven Kent Hunter, Esq.
-and-
KLUGER PERETZ, P.A.
BY: Stuart Silver, Esq., and
Keisha Harris, Esq.
On behalf of the Plaintiff

SHOOK HARDY & BACON, L.L.P.
BY: Kenneth J. Reilly, Esq.
On behalf of the Defendant, Philip Morris

SHOOK HARDY & BACON, L.L.P.
BY: William Geraghty, Esq.
On behalf of the Defendant, Lorillard

ADORNO & YOSS, P.A.
BY: Anthony Upshaw, Esq.
On behalf of the Defendant, Brown & Williamson

WOMBLE CARLYLE SANDRIDGE & RICE
BY: Jonathan Engram, Esq.
On behalf of the Defendant, RJ Reynolds

http://legacy.library.ucsf.edu/tid/xcq07a00/pdf
Source: http://www.industrydocuments.ucsf.edu/docs/qygl0001

I N D E X

Witness	Direct	Cross	Redirect	Recross
DIANA HANNAN				
(By Ms. Harris)	1960		1984	
(By Mr. Upshaw)		1971		
FRANK ROUTH				
(By Mr. Silver)	1987			

E X H I B I T S

PLAINTIFF'S	
Plaintiff's Exhibit No. 16	1957
Plaintiff's Exhibit Nos. 17 and 18	2010

(Whereupon, the following proceedings were held:)

THE COURT: Ladies and gentlemen, I've had some time to think over the issues we discussed just before lunch. I've had an opportunity to read and reread the website of Philip Morris USA.

After reading the highlighted portions of the testimony Mr. Hunter gave me in Volume 8, and rereading Lee versus Department of Health, and skimming the Defendant's Motion in Limine to Exclude the Surgeon General's Report, I'm satisfied to do the following, and this is the way we will handle it.

There is no doubt in my mind that the website itself does not fit within the Florida version of 91.803(a). Lee is fairly clear that it does not permit into evidence a public document, unless it's a report into investigation made by the authority in question. If it's simply a compilation of others' investigation, it's not admissible, and that's what the Surgeon General's Report seems to be.

But having said that, it seems to me it is fair game as cross examination of any witness who takes the position for the defense as an expert that there is no connection between or it hasn't been proven, the connection between secondhand smoke and cancer, it seems to me it's fair game, because it lists a number of reports prepared by other agencies and investigators.

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In addition, the website itself seems to me to be an obvious admission against interest of Philip Morris USA, and then that led to my noting down some questions. Is it assumed in this case that there is joint and several liability?

MR. HUNTER: Yes.

MR. REILLY: No.

MR. GERAGHTY: No, Your Honor.

MR. REILLY: Absolutely not.

THE COURT: It sounds like question one should have been answered about three years ago, but it was not.

Even though -- without deciding whether or not there is joint and several liability, clearly I'm not going to decide that without some more argument and thought, but even so, even assuming it's not joint and several

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liability, it seems to me unfair not to allow it in as against Philip Morris USA, with a curative instruction to the jury that it is admitted only for the purposes of an admission by Philip Morris and not as against any other defendant which has not admitted this.

And I'm assuming, in light of the existing cross examination on plaintiff's experts, there is no admission that secondhand smoke causes cancer either generally or specifically in this case. Is that a fair assumption?

MR. REILLY: That's a fair assumption, Your Honor.

THE COURT: All right.

MR. REILLY: But, in addition to that, not only is there not joint and several liability, but, and I don't know how Your Honor is going to rule on this --

THE COURT: Well, the more basic issue yet has occurred to me, and that is, if there is no joint and several liability, is the theory that your liability in this case, assuming the jury finds it, is predicated on the fact that there isn't any evidence that your product caused her exposure to secondhand smoke, and, therefore,

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it must be assumed that you've agreed in some way, either in the settlement agreement or otherwise, that that isn't a necessary element of proof, and that if you manufacture the product and it can cause cancer, and they prove it did cause cancer to this plaintiff, then you're liable. Kind of like a twist on the market-share theory.

Those questions all occurred to me, and I don't really know the answers, but I do know that we are at the stage in this trial where I need to address the question of the website, and it seems to me clearly it's an admission against interest because it contains statements that say your client, Mr. Reilly, acknowledges that public health officials have concluded that secondhand smoke from cigarettes causes disease, including lung cancer, and that -- it

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goes on and on, but that's the primary finding.
At a minimum, then, it seems to me that this is an admission against interest, and I will give it with the limited instruction.
And as to the Surgeon General's Report of 1986, the one that addresses the effects of secondhand smoke, I will allow that to be used

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on cross examination if and when a witness takes a contrary position with the defendant.
MR. UPSHAW: Your Honor, on behalf of B & W, I would object, for the record.
THE COURT: I assume, you can say it for the record, none of you have agreed with anything I've said.
MR. GERAGHTY: That's correct.
MR. ENGRAM: That's correct.
MR. GERAGHTY: On behalf of Lorillard.
THE COURT: Bring in the jury.
MR. SILVER: Your Honor, should we address the Broin issue, as well, before the jury comes in?
THE COURT: Yes.
Broin, the issue is not whether you can use it; I think the agreement says you can. It's whether or not it's going to exceed the limit on experts.
MR. SILVER: It's the imposition placed on us as to the number of people that should speak to causation. The dilemma we're in, as plaintiff's counsel, is trying to prove specific causation through treating physicians who don't make a practice of literature

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searches as part of their career. That's why, when we appeared before you for the first time at the pretrial, I argued for an additional witness.
At first you said, "I will give you a fourth." Then Mr. Reilly spoke, and you receded from that.
The concern is the same, and I don't want to waste the Court's time. We need to be able to prove generically what is difficult for a family practitioner, oncologist, pulmonologist, to prove, who treats patients mainly and base their treatment and time on a clinical practice.
THE COURT: Refresh my memory. The witness that's testified for the plaintiff, experts, who opined on causation, general and specific causation, were any of them researchers?
MR. SILVER: None were researchers by profession, no.
THE COURT: Meaning they had not done the work itself to reach the conclusions they gave?
MR. HUNTER: Yes.
THE COURT: That's correct, a correct

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assumption?
MR. HUNTER: Yes, at this time.
THE COURT: You know, the plea

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touching-my-heart theory is reaching me now about allowing them one more expert who has the in-the-trenches experience to give that opinion, only as a general causation, not specific causation.

MR. REILLY: Your Honor, the prejudice to the defense is enormous.

THE COURT: I thought about that. It's before you put on your case.

MR. REILLY: Not only that --

THE COURT: Wait. You haven't committed yet on who you're using or the order in which they testify.

MR. REILLY: Your Honor, I've not only committed to you, I've committed to this jury, and I committed to this jury in my opening statement who was coming. I told this jury what they would talk about. I told this jury -- I told Your Honor, before this jury trial started, on the first day of trial, that plaintiff's counsel had decided who they're using. I put it on the record. And then in

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opening statement, not only did I tell this jury who was coming on our behalf, I told them who was coming on behalf of the plaintiff.

The prejudice to the defense at this moment, to allow them to inject another expert into this case, one who they tactically decided not to call, but who now, because they don't like the way one of the chosen experts testified, they want to ask you to prejudice us enormously and to give them one more. But there is no way to unring the bell of what I told this jury in opening statement.

There is no way to tell this jury: Oh, gosh, I've made -- the plaintiffs have convinced me that Dr. Messino testified so poorly that these plaintiff's lawyers made a decision that they now regret.

MR. HUNTER: Judge, I never committed --

THE COURT: Wait. Stop. Let him finish.

MR. REILLY: And they wish that they had done what you told them they could do. You told them Messino is out, and you choose whichever one of these folks from Broin you want.

And then they made a different choice, and

1954

that, Your Honor, is just plain unfair to the defense.

MR. HUNTER: This issue came up.

MR. ENGRAM: May I?

THE COURT: Well, why don't we let Mr. Engram finish, and then you'll respond and that will be the end of it.

MR. ENGRAM: Your Honor, we made this choice when Judge Solomon made his ruling, and released our general causation expert and epidemiologist, who they deposed, Ron Marks, from the University of Florida. We've not had any contact with Dr. Marks since June, and we -- there's no way that we could enlist his

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support to testify in this case next week.
MR. REILLY: And in addition to that, Your Honor, Dr. Villa is a local -- now, he may be an excellent -- he is an excellent pathologist and oncologist, but he's -- he is of the same qualifications as Dr. Roggli and Dr. Messino. He hasn't done any original -- he hasn't done any original ETS work either.
Dr. Davies, who I'm bringing from England, isn't even -- he's here to talk about the study that he did on flight attendants. So to say

1955

that we somehow have some cadre of experts who are going to come in and go through all of the research they did on secondhand smoke and general causation --
THE COURT: I understand.
Response.
MR. HUNTER: Judge, I never committed to which witnesses I was going to call.
Mr. Reilly tried to hem me into a position on that, and before we call witnesses, and I said, "Judge, I want to be clear, I have not made any -- any election of who I'm going to call." So he can't say.
THE COURT: But now he's said you have made that election in light of my ruling, relying on my ruling.
MR. HUNTER: What he's arguing now is what he told the jury in opening. He's told them something in opening --
THE COURT: I'm not impressed by that argument. You can always tell the jury there will be another witness. That's fine.
But I am concerned --
MR. HUNTER: Judge, the thing is --
THE COURT: -- concerned about --

1956

MR. HUNTER: They've tried -- they've tried a number of these. They have a whole array of experts. They've listed 15 or 20 of them.
THE COURT: I understand. Mr. Hunter, I'm going to adhere to my ruling. You're limited to three.
Are we ready?
MR. SILVER: Yes, sir.
THE COURT: Bring in the jury.
(Whereupon, the jury entered the courtroom.)
THE COURT: Good afternoon, ladies and gentlemen. Please be seated.
The usual apologies for keeping you waiting. We had to take up some matters that needed to be addressed.
Are you ready to continue?
MR. SILVER: Yes, Your Honor.
THE COURT: Continue.
MR. SILVER: Your Honor, we would offer into evidence the Philip Morris website that we referenced and has been ruled upon.
THE COURT: Members of the jury, this document, which is going to be admitted into evidence, is admissible only against the

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1957

interests of Philip Morris USA. It is not admissible against the interests of any of the other defendants in this case, RJ Reynolds Tobacco Company, Lorillard Tobacco Company and Brown & Williamson Corp., individually, and as successor to American Tobacco Company. You're merely to consider it as against Philip Morris, Incorporated, alone.

MR. SILVER: Thank you. For the record, it's been marked as Plaintiff's Exhibit 16.

THE COURT: Thank you.

(Thereupon, the referred-to document was marked by the Clerk in Evidence as Plaintiff's Exhibit No. 16.)

MR. SILVER: May I publish an enlarged version of this to the jury? Thank you.

Ladies and gentlemen, this is Exhibit 16.

Can you see that, sir?

THE JURY PANEL: (Responds affirmatively.)

MR. SILVER: If you would just acknowledge when you're through, I'll be happy to take it back.

Has everyone had a chance to see it?

THE JURY PANEL: (Responds affirmatively.)

MR. SILVER: Thank you.

1958

Your Honor, the plaintiff would also offer into evidence the life expectancy of Gail Routh.

THE COURT: Members of the jury, counsel is going to read to you from what is called a mortality table. It is nothing more than a compilation of the life expectancy a person of the age and sex of the plaintiff in this case.

MR. SILVER: Ladies and gentlemen, the life expectancy of a woman of age 54 is 29.51 years.

We'd also offer into evidence at this time, Your Honor, the operative report of Dr. Mallonee dated 4/19/93.

THE COURT: Without objection, admitted into evidence.

MR. REILLY: No objection.

THE COURT: Next numbered, plaintiffs.

MR. SILVER: Thank you. Your Honor, the next exhibit we would like to offer into evidence is a compilation of all of the medical bills incurred by Gail Routh in treatment of the injuries for which she has been diagnosed and treated, lung cancer, bronchitis and sinusitis. It has previously been marked as

1959

Composite Exhibit 130. I don't believe there is any objection to that either.

MR. REILLY: No objection, Your Honor.

THE COURT: Admitted without objection.

MR. SILVER: Your Honor, if I may, the total amount is $155,432.06.

And may I publish to the jury?

THE COURT: Yes.

MR. SILVER: Thank you.

That's all at this juncture in terms of

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exhibits, Your Honor.
MS. HARRIS: Your Honor, plaintiff calls Diana Hannan.
THE COURT: Diana Anderson.
MS. HARRIS: Hannan, H-A-N-N-A-N.

Thereupon:

DIANA HANNAN

a witness named in the notice heretofore filed, being of lawful age and having been first duly sworn, testified on her oath as follows:

THE COURT: Make sure to lean forward into the microphone so that they can hear you.
THE WITNESS: Okay. Thank you.

1960

DIRECT EXAMINATION

BY MS. HARRIS:

Q. Would you please state for the jury your full name and address?
A. Yes. My name is Diana Hannan, and I live at [DELETED].
Q. And what's your occupation?
A. I'm a flight attendant with US Airways.
Q. How long have you been a flight attendant?
A. 31 years.
Q. Have you always been with US Airways?
A. Yes, I have.
Q. Was US Airways previously known --
A. It was previously known as Allegheny Airlines, and they changed their name.
Q. What type of aircraft have you flown on?
A. In all my years of flying?
Q. Yes, all your years of flying.
A. I've flowing on a Convair 580, flown on BAC-111s, I've flown on DC-9s. I've flown on 737s, 200s, 300s, 400s, 767s, A-330s.
Those are the -- most of the airplanes.
Q. What city were you based out of when you began working as a flight attendant?
A. Washington, D.C.

1961

Q. And what year was that?
A. 1972.
Q. Do you know Gail Routh?
A. Yes, I do.
Q. How do you know her?
A. I met Gail when I was -- when I started flying.
Q. Was she based out of the same --
A. Yes, she was.
Q. -- city?
Did you and Gail ever work any flights together?
A. Yes, we did.
Q. Approximately how many?
A. Well, during the time we were based in Washington, I would estimate between 30 and 40.
Q. And what type of aircraft have you and Gail worked on together?
A. I would say BAC-111, DC-9, the 737 series.
Q. When you began working -- when you began working as a flight attendant in 1972, was smoking

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allowed throughout the cabin?
A. Yes.
Q. Would you please tell the jury the smoke that you observed in the cabin at that time?

1962

A. Well, since smoking was allowed, once we took off, it was very smokey, intense. The cabin was -- it all depended how many smokers were on board, but it was smokey, thick. It was in the air. The ventilation at that time in most of our planes was terrible.
Q. Was the smoke concentrated at that time in any particular area of the cabin?
A. When it was the whole cabin, it was everywhere.
Q. Did you work the Convair 580?
A. Yes, I did.
Q. Starting at that time?
A. Yes, I did.
Q. How many flight attendants worked on that plane?
A. One.
Q. And how was the smoke on the Convair 580?
A. Once again, it was bad. If there were a lot of people smoking, it was very thick.
Q. Okay. I want to talk about a period of time when smoking sections were designated on aircraft. Do you remember approximately what year that occurred?
A. I think that was some -- early '70s. Yes,

1963

'73, '74.
Q. Where were the smoking sections located?
A. In the rear of the aircraft. Well, they would decide every flight, they would decide on the amount of smokers, and so they would put a sign up, and it would be a different amount of rows; but it would be from a certain section, let's say, in the middle to the back of the aircraft would be the smoking section.
Q. During that time when the smoking designations first occurred, was there a first class on the aircraft?
A. No.
Q. It was the whole --
A. It was all one cabin, yes, it was.
Q. Okay. On any given aircraft, would the smoking section vary from flight to flight or would the smoking section always be the same size, same amount?
A. No. It would vary.
Q. Why?
A. They would change it -- for the amount of people that wanted to smoke, the agent would come on sometimes and say, "Okay, we're going to move the smoking section up a little more, a couple more rows

1964

forward." You know, that's usually how it went.
Q. And how was the smoke on the aircraft during that time?
A. Well, it went through the entire aircraft. I mean, it was concentrated where the smokers were, but it obviously flowed through the entire airplane.

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Q. Was that consistent from models of aircraft, or was there a difference in the smoke levels from aircraft to aircraft?
A. I think it was the same.
Q. Were there instances when smokers sat in the nonsmoking section?
A. They couldn't smoke there, but there were instances where smokers would sit in the nonsmoking because they didn't want to smell the smoke, but yet, they would get up in flight and go and sit in the smoking section because they wanted to smoke a cigarette, but they didn't want to sit there for the entire flight.
Q. Were these smoking conditions present on the flights that you worked with Gail?
A. Yes.
Q. Do you recall any particular brands of cigarettes that the passengers smoked on the airplanes?

1965

A. Marlboro, Kents, Winstons, Kool, Lucky Strike. I'm trying to remember. Since I'm not a smoker, I'm just trying to remember when I found the packs left on the seats and in the seat pockets.
Q. So you would find the pack?
A. Yes. They would leave their empty packs on the seat.
Q. During the time that Gail was working as a flight attendant, was there ever a time where she appeared to you to be congested?
A. Yes. There were times where she didn't come to work because she wasn't well, and it was because of congestion.
Q. Were there any other symptoms that you observed that accompanied the congestion?
A. Coughing.
Q. What city were you based out of when you were working with Gail?
A. Washington.
Q. And about how many years were both you and Gail based out of that city?
A. Probably close to -- together, we were based there, I would say, close to 15 years.
Q. Did there come a time when Gail was no longer based in D.C.?

1966

A. Yes.
Q. And about approximately what year was that?
A. '86, '87, late '80s.
Q. Did you and Gail fly any -- or work any flights together after that point?
A. Well, she left, was gone for a while, and then she came back for a short while and took some flights at that time, but it was a short time; I would say maybe a year.
Q. Now, after Gail left the D.C. base, did you remain friends during that time?
A. Yes.
Q. What was, or tell the jury, I guess, about the Gail that you became friends with.
A. Very fun, laughing, great personality, generous, kind lady. We liked each other. We

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just -- we had a lot in common, lots of things we liked, and she was very active. She was a golfer. She would jog, she would jog on trips. She was a very active, vibrant woman.

Q. What sorts of things would the two of you do together as friends?

A. Oh, we'd go out to lunch, we'd take trips to little towns and go shopping, go out to dinner.

1967

We took vacations. We did the theater.

Q. Okay. And you said that once Gail left the D.C. base, you remained friends?

A. Oh, yes.

Q. During that time?

A. Oh, yes.

Q. How did you keep in touch with her?

A. Oh, by phone, cards, letters. I sent gifts, birthday gifts.

Q. Did you visit each other?

A. Oh, yes. Oh, yes. We'd go back and forth. Wherever she was, I would go to see her or she'd come to see me. Sometimes I was on a flight overnight where she was, and then I would see her; other times it would be a vacation, where I planned to go see her, you know, and it would be the same with her.

Q. Was Gail, during that period of time, was she a physically active person? Did you observe her doing like any sort of physical activities or exercises?

A. In the early years, yes. I mean --

Q. What types?

A. Well, she'd golf. She was always golfing. I was not a golfer. I was always amazed that she

1968

was out there golfing and running, you know, jogging a lot. She was always running so many miles. She had to run X amount of miles every day, yes.

Q. Was there a time in 1999 when you learned that Gail had lung cancer?

A. Yes.

Q. Now, without telling me what anyone told you, how did you find out about the lung cancer?

A. Gail told me.

Q. And how was her emotional state that you observed when she found out about it?

A. Very upset, tearful, very distraught.

Q. Did you see her after -- some time after that? Did you see her after she was diagnosed?

A. I saw her -- actually, after she had her surgery and she had her treatment, I saw her after, but she wanted to go through all that and didn't want me to be there while she was really ill, was bad, and I saw her after that.

Q. When you saw her at that point, what was her physical state then?

A. Oh, much thinner, frail. Thin, frail, got winded. Couldn't really, you know, do the fast-paced things we always did before. We would do things that would take her a lot longer, slower.

1969

Q. Can you give me an example?

A. Well, we went on a vacation and went

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shopping, and every store we went into, she had to sit down. She would find a seat in every store and wait while I looked at something or she looked at something. She'd say, "I have to sit and rest. I can't go yet." And then we had lunch, and the same day, and I went to go look for a store and she says, "Why don't you just let me stay here at the restaurant and you go look and come back. If you find it, let me know; we'll try to walk over there."

So I left her there and I came back and found it, and we slowly walked over, but I found myself walking ahead of her a lot and I'd have to stop and say: Gees, you know, she can't walk this fast. Those things.

Q. I'm sorry?

A. That was just a recent example.

Q. How was her emotional demeanor at the time that you observed her?

A. Well, she's always had -- had a good attitude about everything, but I could tell she was sad and was looking down a lot and very quiet, not as talkative and as perky as she used to be.

Q. Was there a time in late 2002 when you

1970

heard that Gail's cancer had recurred?

A. Yes.

Q. And how did you learn about that?

A. She called me on the phone and told me.

Q. And how did she -- how was her emotional state that you observed when she told you that?

A. Same way: upset, crying, very distraught. Couldn't talk very much. Couldn't really say hardly anything. Just wishing it weren't so.

Q. Did you see her or when did you see her when you got that phone call from her?

A. I saw her after I knew about that. That was, I believe, in the beginning of December. She came up to the Washington area to visit her son because he rented a townhouse. And she wanted to help him get things organized, and I met her then and I went to help her. And when I got there, she said, "Let yourself in." She was on the couch, and, you know, very slow. A lot of things were out to unpack and pack and she said, "I can't get to it today. Just too much for me. I can't."

And one day I wanted to do something, and she -- I didn't see her the whole day after that; she was too tired. So pretty tired and a lot thinner.

1971

Q. Was she the energetic, upbeat sort of personality that you remember her to be previous?

A. No. No. Just pretty tired, just always tired and, you know, wanting to do things, but "I just can't today. Let's see how I feel tomorrow. But I just really have to just rest." She was not the same; you know, she's always wanting to go somewhere and do something fast. Fast is no longer in her life. Slow.

MS. HARRIS: Your Honor, may I have a minute?

Your Honor, I have no further questions.

THE COURT: Cross examination?

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MR. UPSHAW: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. UPSHAW:

Q. Miss Hannan, good afternoon. My name is Anthony Upshaw. I represent Brown & Williamson, one of the defendants in the case. I think you and I met during your examination, your deposition; correct?

A. Correct.

Q. Okay. You and Mrs. Routh have been friends now for almost 30 years; right? Over 30 years?

1972

A. (Nodding head up and down.)

Q. Yes?

A. Correct.

Q. You have to answer out loud because she can't take down your headshakes. Okay?

A. Yes.

Q. In fact, you came from -- you live in [DELETED]?

A. Yes.

Q. You came from Maryland to Miami so you could testify for your friend today; right?

A. Yes, I did.

Q. At the time we took your deposition, you came to Miami that time, as well?

A. Yes, I did.

Q. Now, you've said you flew many times with Mrs. Routh. I think you said 30 or 40 times, roughly?

A. Roughly.

Q. Okay. And you've been a flight attendant for about 30 years, or 31 years, I think you told us?

A. Yes.

Q. You started the same year that Mrs. Routh started?

1973

A. Yes.

Q. And in the time you flew with Mrs. Routh -- which was mostly, if I'm correct, in the '70s and early '80s, right, before she left for Germany?

A. Yes.

Q. And the 30 or 40 times that you flew with her, those were separate flights; right?

A. Yes.

Q. Each one of those was a flight?

A. Yes.

Q. Now, you were working about 80 hours a month back then?

A. Approximately.

Q. So how many flights per month does that entail, actual flights, not trips, but flights?

A. There is a difference. Flights, in a month, could be, gosh, there could be five flights on a trip.

Q. One trip?

A. On one trip, so, you know, sometimes five, 25 flights a month. I mean, that's an approximate.

Q. All right. So --

A. It could be more. It probably is more

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than that.

Q. More --
A. When I say 25 times, 30 or 40 trips, not flights, that were actually go out, be gone, come back.
Q. All right. So, as you told us, that would be almost five trips roughly, sometimes more a month, when you're flying about 80 hours a week -- a month? I'm sorry.
A. Yes. It could be five trips. Yes.
Q. And you said you've only flown with her about -- let's say your highest number is 40 times. Let's say she had 40 trips with you in 30 years, would you say roughly? I'm giving you your largest number.
A. Yes.
Q. I know you're nodding your head and I understand you're a little nervous, right, so I just want to make sure our court reporter can take it down. Okay.
A. (Shakes head yes.)
Q. Now, when you look at that, really, over the time frame, 30 years, you really had 40 flights, and you had five flights a month, that's not a lot of flights together or trips together, we should correct that?

A. Well, I don't know. No comment.
Q. Okay. Now, when you're working a flight, on a particular flight with Mrs. Routh, she's doing her job and you're doing your job; right?
A. Correct.
Q. You're not watching her do her job, obviously she's probably not watching you do your job; everybody is doing what they're supposed to be doing?
A. Correct.
Q. If I recall from your deposition, you don't have any recollection, actually, where Mrs. Routh worked, what position she worked on any particular flight, do you?
A. Well -- would you restate that?
Q. Sure.
Do you have a recollection -- if I recall correctly, you didn't have a recollection as to where Mrs. Routh worked, what position on the plane she worked on any particular flight?
A. It could be different on any particular flight or trip, yes.
Q. Okay. The last time you and Mrs. Routh were based together was in D.C., I think, was your testimony?

A. Yes.
Q. The last time Mrs. Routh was based in D.C., I believe, was 1987; right? Do you know that?
A. I don't know that.
Q. Does that sound about the right time frame in your friendship?
A. It could be.
Q. Okay. Now, in 1987, there was still smoking allowed on US Air flights; right?

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A. Yes.
Q. And isn't it a fact that you've never flown or worked a flight with Mrs. Routh where smoking was not allowed; that is, all of the flights after 1990 on domestic?
A. After 1990 -- was it 1990? No, it wasn't 1990.
Q. If I told you the ban on smoking flights in the United States happened in 1990, does that ring a bell for you?
A. I thought it was later than that.
Q. You thought it was later than that?
A. Yes.
Q. Let me ask you this. The ban on all US Air flights from smoking happened in 1996; do you recall that?

1977

A. Yes.
Q. But you don't recall specifically what year the ban happened on smoking, the nonsmoking domestic flights?
A. Well, there were several. There were two-hour bans, and then there were six-hour bans. You know, it graduated. So certain flights were allowed to have smoking and others were not allowed to have smoking because of the length of the flight.
Q. Let me see if I can refresh your recollection for us today.
Does it ring a bell that in 1988 is when the two-hour ban went into effect?
A. Yes.
Q. Then it graduated in 1990 to the six-hour ban?
A. Okay.
Q. That puts it a little more in perspective for you.
You were in the wet lease program out of the Baltimore base?
A. Yes.
Q. Mrs. Routh was in the wet lease program out of the Charlotte base?
A. Yes.

1978

Q. During the wet lease program, you never flew together?
A. Correct.
Q. Is that right?
A. Correct.
Q. So you never flew any international flights with Mrs. Routh?
A. Correct.
Q. Now, on many occasions during your friendship with Mrs. Routh, she told you that she never liked smoking; is that right? She never liked being around cigarette smoke?
A. I know that for a fact.
Q. Okay. In fact, because she told you she never liked being around cigarette smoke?
A. Correct.
Q. Now, do you recall ever seeing her complain about smoke on an aircraft that you were flying together?
A. Yes, I do.

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Q. But you don't recall whether or not she ever reported that to the pilots; do you?
A. I don't know.
Q. Okay. Now, in fact, didn't she take the opportunity to go back to a smoking environment when

1979

she took the opportunity to join the wet lease program?
A. That was, unfortunately, still a smokey environment.
Q. Right. And that was something that you had to apply for, based upon your seniority; right?
A. Correct.
Q. And those flights from London to Frankfurt -- or London or Frankfurt were longer than six hours; weren't they?
A. Oh, yes.
Q. About eight to nine hours would be correct?
A. Yes.
Q. At that time, when the wet lease program was going on, 1993 to about 1996, if you flew domestic for US Air, there was no smoking on those flights; correct?
A. Correct.
Q. Now, Mrs. Routh preferred to fly in first class; didn't she?
A. Yes.
Q. And you never worked first class with Mrs. Routh; did you?
A. That's correct.

1980

Q. In fact, you mentioned that you worked the Convair 580 when you first started. In fact, when Mrs. Routh first started, you worked on the Convair for over a year?
A. Or however long Allegheny Airlines had the Convair, and I can't give you the exact amount of years, but, yes.
Q. In fact, you would recall working it over two years; don't you?
A. As long as we had the aircraft, as long as I worked it.
Q. As you told us, that was a one-flight-attendant airplane?
A. Yes.
Q. So you never, in fact, worked the Convair 580 with Mrs. Routh?
A. Correct.
Q. I think you said during your direct examination, and you'll admit to all of us, that the nonsmoking section was less smokey than the smoking section, right?
A. Not much.
Q. But you do admit there was a difference?
A. Slight.
Q. And it's your testimony that at no time

1981

was the smoke cleared on the aircraft?
A. No.
Q. So the smoke was the same from the point that people could begin smoking until the point that they had to stop smoking, right before you landed?

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A. Would you ask that question again?
Q. Sure.
It's your testimony that the amount of smoke that was in the cabin was exactly the same from the point people were able to light up on the plane to the point they had to put out the last cigarette before you were starting the descent?
A. Yes.
Q. And the smoke on board aircraft bothered you; didn't it?
A. Yes, it did.
Q. Yet, you never complained to any captain about the smoke; did you?
A. I don't recall.
Q. Okay. You never asked the captain to turn on the no-smoking sign in the middle of the flight; did you?
A. I don't recall.
Q. Do you remember when you came down here for your deposition, I think it was January 24,

1982

2003, January of this year?
A. Yes, I do.
MR. UPSHAW: Counsel, Page 84, Line 17.
BY MR. UPSHAW:
Q. Miss Hannan, let's see if you recall this question and answer from your deposition. Okay.
The question: "Did you ever complain to the cockpit, the captain and the copilot, about the amount of cigarette smoke in the plane?"
Your answer: "I can't think of a specific complaint that I made."
Does that refresh your recollection on that question?
A. Yes.
Q. And you never filed a written complaint to your supervisors about the smokey condition on any aircraft; did you?
A. No.
Q. Now, you said that Mrs. Routh had sometime missed work because she was congested?
A. That's correct.
Q. Are you aware that she never went over the allotted number of sick days you have as a US Air flight attendant during her career? Are you aware of that?

1983

A. That she never went over the allotted days?
Q. Yes. That she never used up her number of sick days; did you know that?
A. I didn't know that.
Q. I think the only other symptom you told us about is you think she had a cough sometimes, too, correct?
A. That's correct.
Q. You told us that the ventilation on some of the aircraft you flew on was terrible, I think was the word you used, right?
A. I probably used "terrible." It was terrible.
Q. Okay. I think that's what you said on your direct exam. But you're not an expert on the

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ventilation systems on aircraft; are you?
A. No.
MR. UPSHAW: One second, Your Honor.
I don't have any further questions. Thank you, Your Honor.
THE COURT: Redirect.
MS. HARRIS: Just briefly, Your Honor.

1984

REDIRECT EXAMINATION

BY MS. HARRIS:

Q. Miss Hannan, you just testified that you're not an expert on airplane ventilation systems; right?

A. Correct.

Q. As a flight attendant for over 30 years, you said that you -- you testified that several of those years you flew in smoke?

A. Yes.

Q. Okay.

A. Sorry.

Q. That's okay.

And working in that environment for several years, did you see -- or what did you see of the smokey environment?

A. It was bad. I mean, it was not clean, fresh air. Wait, wait. It was smokey. It was annoying. It was all over your clothes. You know, you could -- when you got off a trip, if you didn't have time to wash your hair that night, you could smell it on your pillow.

It was -- you know, I found many times smokers would be holding their cigarettes down beside them in the aircraft, and you'd come and ask

1985

them what they wanted to drink, and that smoke would be going just right in your face. They thought they were holding it away from you, but really it was in your face a lot. So when you got close to a passenger that was smoking, you got it.

Q. As a flight attendant, could you ask a passenger to put a cigarette out?

A. No, I couldn't, because they were allowed to smoke on the aircraft.

Q. That was --

A. I couldn't say, "You have to put that cigarette out." When the no-smoking sign went on and they didn't put it out, we had to ask them to please extinguish it at that time, but only at that time.

Q. You said it was their right to smoke, so then, as a flight attendant, would you complain, would you go and make complaints, generally, that passengers stop smoking or go complain to the pilot to turn on the no-smoking sign?

A. Well, at the time, when I was flying, those early years, I didn't think we could go up and tell the captain, "You have to turn off -- turn on the no-smoking sign because they're smoking." You know, that was the way it was. They could smoke on

1986

the flights until it was time to land; they had to

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put the cigarettes out.
But to go up and tell the pilot to do that, we were never told in training that, yes, you can go tell the captain to turn the sign off if you don't want to smell any smoke. No, it wasn't -- that's the way it was.
Q. Is it something that you observed generally with fellow flight attendants?
A. Oh, yes. Yes.
Q. They also, I guess, thought the same things as you?
A. Yes.
MS. HARRIS: No further questions.
THE COURT: Members of the jury, have you any questions of this witness?
THE JURY PANEL: (No response.)
THE COURT: Thank you very much, Ma'am. You may step down.
Call your next witness.
MR. SILVER: We call Frank Routh to the witness stand.
THE COURT: Please step up here, sir.
Thereupon:

FRANK ROUTH

a witness named in the notice heretofore filed, being of lawful age and having been first duly sworn, testified on his oath as follows:
THE COURT: Speak loudly enough so all of the jurors can hear you.
THE WITNESS: Yes, sir.

DIRECT EXAMINATION

BY MR. SILVER:
Q. Good afternoon.
A. Good afternoon.
Q. Tell the jury your name, please, and where you reside.
A. My name is Frank Douglas Routh. I reside with my wife in Daytona Beach, and also in Marion, North Carolina.
Q. Can you tell us what you do for a living, Frank?
A. I am an airline pilot.
Q. For whom are you employed?
A. US Airways.
Q. How long have you been employed by US Airways?
A. Approximately 20 years.
Q. And did you work for the same company by another name, or one that was acquired by US Air before that?
A. Yes, sir. I was originally with Piedmont Airlines.
Q. And did there come a time when you flew on flights that Gail Routh also flew on?
A. Yes, I did.
Q. When was that?
A. I think the first flight that I recall flying with Gail was around 1992.
Q. And we're referring to Gail, that's your wife presently?
A. My current wife, yes, sir.

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Q. When were you married?
A. We married February 20th, 2000.
Q. Now, I think you identified the first contact that you had with her in 2000 -- in 1992?
A. We flew a trip, domestic trip, to the best of my recollection, in 1992 together.
Q. Was she working --
A. We seem to recall each of us flying a trip together in 1992.
Q. Was she working the trip as a flight attendant at the time?
A. Yes, she was.
Q. And were you piloting the flight?

1989

A. Yes.
Q. And did you find that there were other flights that you would take together as years continued?
A. In later years, in around I think 1994, we would fly trips together quite often.
Q. Did there come a time that you and she flew on the wet lease program with British Airways?
A. Yes.
Q. And, again, were you a pilot on some of those flights?
A. Yes, sir.
Q. Was she a flight attendant on some of those flights?
A. Yes, she was.
Q. And were you able to arrange on occasion to be able to fly with her?
A. Yes, we could at times fly together.
Q. Tell the jury, if you would, please, your relationship with Gail in the years before you were married as you got to know her and what your relationship was like with her at that time.
A. Well, as I said, around the latter part of 1994, to the best of my knowledge, we started essentially dating. We would fly trips together. I

1990

had moved to Daytona Beach. She would come to see me there, and at times I would come up to Marion to see her, as well.

And so we were essentially dating from about that time, until we married in 2000.

Q. What kinds of activities did you engage in with Gail during that time frame?
A. During that time, we had the opportunity to -- when we were in Daytona, we would go bike riding on the beach, swimming, a lot of water sports-type activities down in Florida.

In Marion, we would, as far as activities, I'm trying to recall, we'd play golf occasionally. We weren't avid golfers, but we did go out and try to play a little golf occasionally.

And we'd also vacation together. Gail liked to travel a lot. She liked to go see her friends, and I would accompany her, when I could, to see her friends.

Q. She had -- episodically, she had health issues with sinusitis and bronchitis in those years. Did they interfere with your ability to do things, the kinds of activities that you were discussing and

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describing for us?
A. Well, other than the fact that it did

1991

impede -- you know, if she was sick, obviously we would have to postpone a trip, or we wouldn't be able to go, things of that nature.
She was -- she would get winded from strenuous-type activities, if she had a bout of bronchitis or something of that nature.
Q. Describe for us, if you would, how frequent it was that she would have these sinusitis or bronchitis problems, and we're talking about in the years before her cancer diagnosis?
A. Well, in the -- when we first started being together a lot, it was '94, during those times we would fly international together, and as I recall, she was having sinusitis quite often, and then sometimes it would tend to turn into bronchitis, that type of -- and would go on for quite some time.
Sometimes she would -- she wouldn't be able to make a trip; other times she -- you know, she flew with it. She just kind of sucked it up and it went on, and she'd try to fly, try to work.
Q. What types of symptoms would you observe on the occasions that you just described?
A. Well, I would -- I've observed her, you know, with sinus drainage, you know, with coughing

1992

and hacking, bronchitis.
I observed her with having -- indicating pain in her sinus areas and a shortness of breath and with her hand here (indicating), like, you know, trying to get her breath when she'd have a bad case of bronchitis.
Q. And when was it that you and she first started to consider the notion of getting married?
A. Well, I was considering it a long -- that would have been the year 1999, along the springtime, is when I had started considering marriage again.
Q. And this was before or after her diagnosis?
A. This was before.
Q. Now, were you involved, Frank, in the years that Gail went through the diagnosis and treatment for cancer, were you involved in decision-making and present when Gail got news about certain tests that had been performed?
A. Yes, I was.
Q. Would you say you were present more often than not?
A. Yes, I was.
Q. And were you present at times that the doctors would discuss treatment options for her,

1993

with her?
A. Yes, I was.
Q. Let's refer first to the time frame that the diagnosis was made, after the CT scan and biopsy was performed, and I'm directing your attention to the Spring of '99.
A. Okay.
Q. Without telling us what Gail said, tell me

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what Gail's reaction was to the news, based on the options that she was given?
A. Well, when she actually found out, I was on a trip, and I -- when I came in off the trip, I had a message to call her, and when I called her, she was very upset and wanted me to come home right away. And, of course, I knew that she'd had the test and feared the worst.
So, as soon as I got home, she met -- she met me at the door, very, very upset.
Q. And the decision -- you reached a decision as to how to combat the cancer; correct?
A. Yes.
Q. She underwent surgery?
A. Yes, she did.
Q. And that was in May of '99?
A. Yes.

1994

Q. Did you have occasion to be at the hospital during that time frame?
A. Yes, I was.
Q. Describe for us what you observed in terms of her condition throughout the hospitalization.
A. Well, Gail had, I think it's called a lobectomy. They cut out a rib in her back on the right-hand side and took out two lobes of her right lung, and I observed her in the hospital for 14 days, on epidurals, that type of pain medication. She was told this type of surgery was one of the most painful surgeries that you can have.
I observed her in the hospital throughout those 14 days. About halfway through that period of time of recovery in the hospital, when they took her off of the epidural and put her on other pain medications, in just screaming pain, literally, when she was conscious, under morphine, so they had to put her back on epidural. And it wasn't until, like I said, 14 -- approximately 14 days when she could tolerate the pain under a morphine-type drug, that she was able to come home.
Q. Did you have occasion to see what was being done for her throughout that hospitalization, aside from trying to recuperate and tolerate the

1995

pain?
A. Yes. They would -- there was -- she had a chest tube, she had a tube in the chest in her front and a tube in the back, in her back, and this chest tube would drain off fluid, and they would have her come in and take -- they would come in and she'd have breathing exercises, to try to expand the lobe that was remaining. And I observed that.
Q. After she was -- when she was discharged from the hospital, did she recuperate at home for a while?
A. Yes, she did.
Q. Did you care for her during that time?
A. Yes, I did.
Q. What was that like?
A. Well, it was a very upsetting time for Gail, because when she got out of the hospital, she had the diagnosis, or they had staged her cancer, and so she knew at that time that it wasn't isolated

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in that particular lobe; that the lymph nodes were involved. And --

Q. Why was that upsetting to her?

A. It was very upsetting, because it changed her prognosis, as well as the treatment. It meant that -- we were -- she was hoping that the surgery

1996

would be it and that she would not have to undergo chemotherapy and/or radiation. But we knew after surgery that something would probably have to be done; we weren't sure. So there was a lot of basically nights and days of indecision, where we really didn't know what to do.

Q. Now, after further diagnosis with a PET scan, it was decided that Gail would undergo a regimen of chemotherapy and radiation therapy; is that correct?

A. That's correct.

Q. And did you take her for those treatments?

A. Yes, I did. Gail had, I think, 30 -- approximately 35 radiation treatments. I'm -- I'm fairly confident I drove her to and observed her going to Asheville almost all of those times.

Q. How did Gail tolerate the radiation therapy?

A. The radiation therapy, initially well. But as radiation therapy is, with the burning of the esophagus, so to speak, she started getting a lot of complications from it.

I know many times toward the end driving to Asheville, it's approximately 45 miles up there -- 40 miles up there, toward the end, I'd have

1997

to pull over the side of the road and she would throw up. It was almost all she could do to make it to Asheville for the treatment.

Q. How did the radiation therapy affect her ability to eat and drink, from what you observed?

A. Well, that's when her -- most of her weight loss started. She was -- she was unable to drink anything much at all.

She could hardly eat. You know, they were -- the nutritionist was meeting with her at the hospital and trying to make up things that they thought that she could tolerate, but she was unable to eat or drink hardly anything.

Q. She was getting her chemotherapy simultaneously; correct?

A. Yes. The decision was made about a month -- excuse me -- a week into the first -- into the radiation treatments to add chemotherapy to the regimen, to improve the radiation's ability to hopefully cure the cancer.

Q. And from what you observed, how did she react to the chemotherapy?

A. Well, again, she had increased nausea. There come a point in time where she couldn't keep anything in her stomach, whether it was water or

1998

whether it was any type of food. She couldn't keep anything in her stomach.

She kept losing more and more weight. Eventually she was hospitalized as a result of her

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electrolytes getting out of balance. She couldn't stop throwing up.

She'd be coughing, and from the burning in her throat, she would cough to the point of throwing up.

Q. How frequently was this?

A. Most of the time when she was awake.

Q. Now, Frank, after the radiation, the chemotherapy, there was a period of time when Gail was being seen by the pulmonologist for follow-up; correct?

A. I'm sorry. Repeat it.

Q. Was there a period of time after the chemotherapy and the radiation, where she would visit the pulmonologist routinely or periodically for follow-up?

A. Yes. Yes.

Q. Okay. And it was at that period of time that there were routine CT scans done; is that correct?

A. That's correct.

1999

Q. And tell me, as time passed in that time frame, what was Gail's attitude and spirits and mood?

A. Well, outwardly to the public, they were very good. Inwardly and to me, she often -- almost daily, it would -- it would enter into the conversation, or it would enter into -- you know, I'd go in and find her upset, crying. She was -- she was upset that it -- afraid that it would return.

Q. She was in fear?

A. Yes.

Q. And was that something that characterized the entire years that followed the chemotherapy and radiation therapy until her re-diagnosis?

A. Yes, it did.

Q. Was there some hope during that period of time?

A. Well, I would try to instill in her hope. I think as time would go on, like a couple years -- a couple years post-surgery, post-treatment, she would feel that, you know, as long as things still goes good -- are going good, then the chances would be that it might improve and that it might not come back. Then we worried about it, she worried about

2000

it, but there was -- there was -- it was like it was -- that she was hopeful, but she still worried about it.

Q. Would you characterize that time frame as one in which her life was back to normal, or was it not?

A. Normal as in pre-cancer, no. Her life has never been back to normal. Ever since she -- ever since she had surgery and the radiation and chemotherapy initially in 1999, she has never been back to normal.

There was some improvement. She even tried to go back to work. She wanted to go back to work, and was angry, frustrated that she couldn't. But she was -- she just was not physically able.

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Q. Now, you worked with her for many a year. How important was Gail's work to her?
A. Well, it was very important because, as I mentioned earlier, her friends mean a lot to her.
She likes -- she likes to foster her friendship and that was -- her friendships, and she has -- she has and had a lot of friends at the airline, but not going back to work, you know, you lose -- you lose some of that.
Q. By the way, was she highly regarded at the
2001
airline?
A. Yes.
Q. Commended often?
A. Yes.
Q. Let me, if I can, Frank, fast-forward you to the time, the end of last year, and let's, if you would, please, direct your attention to the occasion when Gail was given some news from Dr. Morelock about results of a CT scan that was performed in November. Were you present for that?
A. Yes, I was.
Q. Do you recall the information that was provided by the doctor to Gail?
A. Yes. Are you speaking after the biopsy?
Q. Yes, sir.
A. Yes, I was there.
Q. And what did she learn in your presence?
A. Well, she learned that the cancer had returned not only in the right lung, but was also present in the left lung, as well.
Q. What did Dr. Morelock recommend that Gail do at that point in time?
A. Dr. Morelock at that time informed Gail that there is no -- there was no cure for what she had at that time, in December, this time that we're
2002
speaking of.
Q. December 2002?
A. Yes.
Q. Did she offer any estimate or range of time that Gail would have?
A. She indicated to -- I did not -- she did not indicate to Gail, to my knowledge, the amount of time that she might have.
Q. Did she do so to you outside of Gail's presence?
A. Yes, she did.
Q. What was that?
A. Dr. Morelock said that her life would be measured in months, not years.
Q. She did, then, refer you to an oncologist; right?
A. She did.
Q. That was Dr. Messino?
A. Yes.
Q. And Gail came under his care and began taking a drug that was prescribed by Dr. Messino; is that right?
A. That's correct.
Q. Were you present in conversations with Gail and Dr. Messino about the drug that he
2003

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prescribed and what it could and couldn't do?
A. Yes, I was.
Q. Tell us what you recall about Dr. Messino's information that was provided to Gail during that visit?
A. Dr. Messino had told Gail that he had no offer of a cure for her cancer, but he had various chemotherapies that could be offered, or this new drug, that at the time wasn't approved by the FDA, but he had it available, that she could possibly get on the list for using the drug for compassionate use only.
Q. Did he describe what he meant by that?
A. Yes. He indicated -- he said that the drug was compassionate, in that it's for people that don't have any chance of a cure, it's incurable, and that this drug can be used in that respect.
Q. And did Gail have any reservations about chemotherapy?
A. She did. But she had gone through chemotherapy before. She did not tolerate it very -- at all, very well at all, and she felt that her quality of life that she had left would be better on this drug, since it had less side effects than chemotherapy.

2004

Q. She started taking the Iressa when, Frank?
A. January 31st, 2002. This is 2003.
Q. This is 2003.
A. Yes. 2002. January -- not January 31st. Excuse me. December 31st. Basically the first of the year, this past year.
Q. She continued to take the drug?
A. Yes. She's continuing to take it even today.
Q. Is she still under the care of Dr. Messino?
A. That's correct.
Q. Has there been some improvement in the CT scans, in terms of what it shows, the size of the tumors, from what he shared with you?
A. From which time?
Q. Between December 31st and today.
A. Yes, there has been an improvement.
Q. And has there been any change in the impression that Dr. Messino had about Gail's chances, given -- notwithstanding the appearance of a change on the CT scans?
A. He indicated that it was -- it's very good that she responded to the Iressa, but as far as -- as far as giving us or giving Gail any indication

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that it was a cure, he has not.
Q. Now, you described for us earlier the public Gail versus the private Gail.
A. Yes.
Q. And I'd like you to do that for us in terms of today, where we are today, how Gail is doing emotionally, psychologically and physically?
A. Physically, in the public, you know, when she goes out, you would tend to think that she is okay. Privately, if she's out -- if she's out with friends, physically she will push herself and put on

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a good front. When she comes in, after being out, she's just totally exhausted and many times the next day she can't do anything.

Q. Has that experience occurred while you've been in Miami with her?

A. Yes, it has.

Q. What has been her physical abilities and limitations while you've been here in Miami?

A. Well, an example was she was here for the first day of testimony, and the sitting here all day long made her unable to attend the next day. She -- she -- I couldn't -- I couldn't get her out of bed the next morning. She had -- she didn't have the strength to come.

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Q. Even though -- even though her activity that previous day was just sitting in the courtroom?

A. Yes.

Q. At home, Frank, describe for us a little bit about what her life is like at home.

A. Well, she -- Gail gets up -- normally sleeps late, if she can, to get the rest, because she requires a lot of rest now. And she will come downstairs, normally I'm down there, and she'll come downstairs and have coffee, try to have some -- I'll try to get her to have a little breakfast.

Q. Does she still have difficulty in terms of eating, whether it's the desire to eat or the ability to eat?

A. Yes.

Q. That's something that you --

A. She has a lot of stomach problems, as far as gastric problems, which she's taking medicine for. She has to take something every day for that.

Q. And how about for her throat, is that still problematic for her?

A. Yes, it is. She -- if she is -- when she takes her shower, it's an exertion for her, and many times when she gets out of the shower after this exertion, she'll start coughing, and she coughs to

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the point of throwing up.

Q. How routine is that?

A. It's not as bad now as it was just maybe less than a year ago or almost a year ago. It seemed to have improved, but up until a year ago, it was more than five -- I'd say at least five out of seven mornings, she would literally cough until she threw up, and I'd have to run down and get some ginger ale or water or something and run back up and help her through the episode.

Q. Are those episodes limited or unique to the morning, or do those happen in the afternoon and evening if she exerts herself?

A. It can happen any time. She carries a little pail with her in the car. If she's out somewhere and she gets coughing, she carries little plastic bags in her purse if she -- if she's somewhere and gets to coughing and she ends up -- she has to throw up. She's very, I guess, sensitive to that, from a standpoint of public perception and how it's perceived.

Q. And what do you do for her to try to

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minimize that experience?
A. Well, I try for her not to exert herself and I try do everything I can to prevent her from
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exerting herself, to where she doesn't -- you know, if she's just had lunch, you know, and she's not -- the last thing she needs is to lose that, because that may be the only thing she eats all day.
Q. Now, you told us that you married Gail after her initial treatment for cancer; right?
A. Yes, I did.
Q. And she continues to have symptoms from her lung cancer; is that right?
A. Yes.
Q. Today, Frank, with everything that you've told us, in terms of your view of Gail and how she is and what she does, what do you admire most about her?
A. I think her courage, her courage to withstand everything she's gone through. She's gone through so much.
MR. SILVER: I apologize.
No further questions.
THE WITNESS: And --
MR. SILVER: Is there something more you want to say? I don't want to --
THE WITNESS: I was just going to say she's -- she's -- you ask about her mental state, and in private, she's very scared.
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Very, very scared.
Q. And how do you help her through that?
A. I just try to be there all the time, if I can.
MR. SILVER: Thank you. I have no further questions.
THE COURT: Cross examination.
MR. GERAGHTY: No questions, Your Honor.
THE COURT: Members of the jury, questions of this witness?
THE JURY PANEL: (No response.)
THE COURT: Thank you, sir. Step down.
Sidebar for a second. I don't need you.
(Thereupon, there was a sidebar without the presence of the court reporter, after which the following proceedings were held:)
THE COURT: Plaintiff, do you rest?
MR. SILVER: We do, Your Honor.
THE COURT: Members of the jury, the plaintiff has rested. The case is not complete. The defense, unfortunately, does not have witnesses available for you this afternoon, so we will start with you tomorrow morning.
2010
Remember, tomorrow morning, when you come up, you need to go to Courtroom 4-2. The clerk will be outside that courtroom to meet with you and take you into the jury room, since you're not familiar with it.
We're getting to the point now where we're going to reach the defense in this case. The

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end of this case is beginning to come in sight. Please be patient. Please have an open mind. Don't talk to anyone about the case and don't let anyone talk to you about it.

Have a good evening. 8:30 tomorrow morning at 4-2.

(Thereupon, documents were marked by the Clerk in Evidence as Plaintiff's Exhibit Nos. 17 and 18.)

(A brief recess was taken, after which the following proceedings were held:)

THE COURT: I just checked with Judge Simmons' office and there are apparently four pretrial orders that are sort of omnibus orders that sort of govern the procedures in this trial.

Is anyone aware of that?

MR. REILLY: No.

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THE COURT: First one is called Order on the Court's Administration and Jurisdiction of the Consummation of the Settlement Agreement.

MR. HUNTER: Yes. That's one.

THE COURT: Second one is Order Enforcing Settlement Agreement Pertaining to the Definition of Nonsmoking Flight Attendants.

MR. HUNTER: That's one.

THE COURT: The next one is -- there are two of them. One is Order on Plaintiffs' and Defendants' Motions for Clarification, and then a Joint Omnibus Order on Plaintiffs' Motion Raised at the May 2000 Status Conference before the Honorable Stuart Simons.

MR. HUNTER: Yes. Those are all orders that control.

THE COURT: Okay. Let me read them.

MR. HUNTER: We've been arguing those to you pretty regularly.

MR. REILLY: I could be wrong, but I don't think one of those orders affects --

THE COURT: Let me skim them. It will make me feel better.

MR. REILLY: All right.

MR. HUNTER: The order on the Court's

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Administration is Judge Kaye's original order that says what we try.

THE COURT: Right. Then there is Judge Siegel's order which raises --

MR. HUNTER: Which agreed with it for different reasons.

THE COURT: The theory being his commission says the same thing as Judge Kaye's. All right.

MR. HUNTER: Judge, when we move, I have to cross examine Dr. Villa, and I need to have an ELMO, and I would like to respectfully request counsel, may I use yours during my cross examination so we can only set up one?

MR. ENGRAM: For a reasonable charge.

MR. REILLY: I got news for you. The Courtroom 4-2 won't take --

MS. STAFFORD: All this equipment.

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MR. REILLY: They blew it out. Don't plan on using that.
THE COURT: You mean the electrical. Actually, it's not enough.
MR. GERAGHTY: That's why we moved up here in the first place.
MR. REILLY: So there won't be -- I can

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tell you, you can use it. You're more than welcome.
MR. ENGRAM: They plugged a T.V. in to show a video and it blew not only on four, but on five, as well.
MR. HUNTER: Here is the thing. Do I --
THE COURT: Our capacity is limited to a view box.
MR. UPSHAW: That's already in the courtroom.
MR. HUNTER: I do need to use it. I do need to use it. So I'm going to bring mine, and if they have to disconnect their realtime or something so I can use it, that's what I'm going to do.
MR. REILLY: I suggest he bring a portable generator. They're available at Home Depot.
MR. HUNTER: So long as I can crank it up when you start doing your direct.
(A brief recess was taken, after which the following proceedings were held:)
THE COURT: All right, ladies and gentlemen. Any motions after the plaintiffs rest?
MR. REILLY: Yes, Your Honor. The

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plaintiffs have now rested. We now hand up to Your Honor a written motion for directed verdict. I've provided a copy to counsel.
Our motion is based on a variety of bases, Your Honor. The first is that the plaintiffs have failed to prove the essential elements necessary for establishing all of the elements of negligence, strict liability and breach of warranty.
But the mere fact that they demonstrated Mrs. Routh is a nonsmoker, they can't possibly have satisfied the requirements of breach of warranty here in the State of Florida, because there is no privity between manufacturer and the user.
Of course, they haven't established that cigarettes are manufactured by these defendants either. They haven't established that these three -- four defendants manufactured a product that caused any harm to this plaintiff.
The only evidence that's come in in this case regarding product, the identification came from the last witness for Mrs. Routh, and that was testimony in which the witness identified various brands of cigarettes, that they had

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seen people put empty packs in their seats and in the ashtrays after her flights were over. That is not Gail Routh, that is not Gail Routh

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and her flights, that's not Gail Routh.
And, in addition to that, there's been no evidence that whatever smoke, if any, was generated by whatever cigarettes were found in the packages or not found in the packages, caused any disease to this plaintiff. No witnesses testified to such an effect.
In addition to that, there has been no evidence in this case that any of the cigarette brands identified by that witness were manufactured by any of these defendants.
These are major deficiencies for which Judge Kaye's order or the settlement agreement create no relief for the plaintiff.
Now, this issue has been raised. It was presented to Your Honor, it was presented to counsel. And there is no evidence supporting the product identification.
They could have attempted to establish some form of market share, perhaps, but they have not even attempted to do that.
That issue, and Your Honor has pointed out

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several times, well, maybe there must be some arrangement in the settlement agreement or through the Ramos decision or somewhere, somehow, but there is none. Judge Kaye's order was silent on it; Judge Siegel's order is silent on it. The settlement says all other burdens of proof remain the same, Paragraph 12-b.
THE COURT: Well, there is one section in the settlement agreement that I've highlighted. It is on Page 11. If you will pull it out. It's sub H: "With respect to each and every action brought by an individual class member or survivor based only on any retained claims, settling defendants further agree" -- I'm skipping ahead.
It's about the middle of the paragraph. "The settling defendants agree not to assert in any such action, by way of motion, as a defense or otherwise, that joinder of settling defendants is improper, or that any other released parties are responsible for, in whole or in part, the injuries or damages."
MR. REILLY: Right.
THE COURT: You read in that --

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MR. REILLY: You know what that is, Your Honor? What that is, is, we said that we will accept service, you can sue us, and we won't raise as a defense that we're an improperly joined party. That's all.
THE COURT: Or that it doesn't state a cause of action; we will answer.
MR. REILLY: That's right. We will answer. The whole purpose there was to prevent the defendants from being able to raise, as preliminary motion practice, any kind of motion that would prevent us from having to answer right up front, and that's --
THE COURT: Well, when it says, "or that

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any other released parties are responsible, in whole or in part."

MR. REILLY: That's right.

THE COURT: That doesn't say that they are responsible.

MR. REILLY: Absolutely.

THE COURT: Only that there is --

MR. REILLY: You see, at the time that the Broin action, as a class action, existed, there were other defendants in the case. For example, Liggett was in the case. And during

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the years that -- some of the years that the plaintiff flew, the market share of Liggett was great, if not greater, than many of the -- probably all of the defendants in this action.

You see, that's -- nobody even touches on this. No witness in this case, not a scintilla of evidence in this case has touched on the fact, and we've raised it several times with Your Honor, how could you possibly apportion responsibility --

Your Honor has now let into evidence a piece of evidence that purportedly is to be used only against Philip Morris on some basis, that I don't know what basis, because there is no availability for apportionment, and that leads us to the next basis for directed verdict, and that is, plaintiff has not proven the necessary elements to establish individual responsibility on the part of any one of these defendants, which is absolutely necessary under Florida law.

Now, I grant that the plaintiffs pithily go through this as if it isn't a necessary element for them to go through. I don't understand. There is no relief from the

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settlement agreement, there is no relief from the Ramos decision, there is no relief from any source whatsoever. It's not like I kept it a secret, held it under a basket; we've been talking about it. We've been talking about it from day one. Yet, no evidence has been presented. It has to be presented. Plaintiff's counsel at one point said they would present it; yet they've presented none.

THE COURT: I understand.

MR. REILLY: Do you want to hear the rest of the motions?

THE COURT: Yes. Get it all.

MR. REILLY: In addition to that, Your Honor, the plaintiffs have failed to prove that plaintiff's lung cancer is an element of her -- I'm sorry. I misstated that.

The plaintiffs have failed to establish that her lung cancer was diagnosed during a time frame that makes it part of this --

THE COURT: I'll deny that ground.

MR. REILLY: And in addition to that, the plaintiffs have failed to prove that her lung cancer was caused by her exposure to secondhand smoke. The plaintiffs failed to prove that she

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has chronic bronchitis or chronic sinusitis or that either one of those was caused by her exposure to secondhand smoke.

THE COURT: There was evidence in the record that would support a verdict if that were the only issue. I'll deny it on that ground.

The one that I guess is the most troubling, is there some written order that binds the parties in this case that says plaintiffs don't have to prove all of the usual and ordinary elements of a cause of action in breach of warranty and negligence, and what was the third?

MR. REILLY: Strict liability.

THE COURT: Strict liability?

MR. HUNTER: Well, yes.

THE COURT: Tell me what it is.

MR. HUNTER: First is Judge Kaye's order on the administration of the settlement --

THE COURT: Let me get that.

MR. HUNTER: -- which is one of the orders --

THE COURT: Yes. This is November 27th, 2000.

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MR. HUNTER: I believe it is. Is that Judge Kaye's order?

THE COURT: It is. Now, tell me which portion.

MR. HUNTER: He was granted the authority by Judge Simons to decide what the common issues would be, and the first thing that came up is: What will one of these Stage II trials consist of? What are the issues that need to be proved?

And that's where he ruled, essentially, like you think. He says you prove: Did the plaintiff suffer illness or damages from exposure to secondhand smoke? And if so, what are those damages?

He didn't add that third generic question, which Judge Siegel engrafted on that inquiry.

But he didn't say we have to prove traditional tort liability under Florida law, and he didn't say we have to prove product identification or their contribution to the --

THE COURT: I was wrong. It's the October 5, 2000, order of Judge Kaye, I think you're referring to.

MR. HUNTER: Now, I have always argued

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that once Judge Simons spoke, at least as a matter of comity, that that should have been the order that all of the judges would follow and those would set the issues in the trials.

THE COURT: Well, Judge Siegel expressly refused to do that.

MR. HUNTER: He did.

THE COURT: He made his own independent determination.

MR. HUNTER: He did. So following on

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Judge Siegel's order, we come here now. What Mr. Reilly is doing essentially is rearguing all of the arguments that have been made both to Judge Kaye --

THE COURT: Let me make sure I have it right, Mr. Hunter.

Judge Kaye says, on October 5, 2000, "In view of the above, it's apparent to this Court that the upcoming individual trials," meaning this one, "referenced in the settlement agreement, ought to be conducted on the basis of being a Stage II trial, to answer the questions of whether ETS was the specific cause of the disease or injury claimed by the plaintiff, and then resolve the issues of

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damages, if any."

Judge Siegel agrees with that, but for different reasons.

In fact, he says you still have to answer the first question, which Judge Kaye apparently doesn't want to have answered in these subsequent trials, and that is: Is ETS a cause of cancer? He determines that it is, while Judge Simons doesn't agree that it is. We won't try that issue, but apparently Judge Siegel says we are.

Where in this order or Judge Simons' order or in the settlement agreement does it say you don't have to prove up that these defendants caused this tobacco smoke to be in the atmosphere that caused your client's injury? Where does it say that?

MR. HUNTER: It doesn't say that's --

THE COURT: Common sense tells me, I'm going to tell you, from having lived through that era, that it would be impossible to do, because, like asbestos, you know, there are some people that put that product on the market, you could never tell which one caused the specific injury to the specific plaintiff,

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so they've gone to a market share-type analysis.

But you didn't do that either. None of that is here. You didn't prove any one of these defendants, as I understand this evidence, made any one of the cigarettes that any one of the people on the plane smoked that caused your client's injuries.

MR. SILVER: Your Honor, this is a case not involving fault. We've said that over and over.

THE COURT: And you said that from the beginning, and I've never understood why.

MR. SILVER: Well, I think implicitly, if not explicitly, because the issues to be tried have always been said to be causation and damages. There's never been a verdict form that sets out liability to each of the defendants in any of the cases that have been tried so far.

THE COURT: That's my next question. Tell

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me, on the cases that have been tried so far, has there ever been any evidence of specific acts by specific defendants that are manufacturing a product?

MR. HUNTER: In one trial before Judge Rothenberg, where they refused to waive the defense of comparative fault, and, therefore, I was able to prove, if you're going to compare the fault, then, you know, I have to prove what the fault was on their part, and we tried a case of fault against them in that case.

THE COURT: There was evidence of their specific involvement in the tobaccos that caused the smoke that caused the injury?

MR. HUNTER: No. Judge Rothenberg, like every other judge, did not require us to do that. What we -- what the fault case centered on in that case was -- the action plan that all of the companies engaged in to continue to make sure that smoking was allowed on the airlines and to fight the bans and to advertise falsely that ETS was an annoyance but it wasn't harmful, and they developed action plans and they got on the planes with their brief cases, and they took the results back and said, "Oh, well, there's just so little out there that it's not a problem," and they ran big ads in the New York Times.

There is a whole witness and a whole set of documents that came into evidence on their fault, but I never have had to prove who made how many cigarettes or what their market share was.

THE COURT: Let's broach it this way. The point being, a specific document in this case that said we don't have any testimony concerning fault in these subsequent trials, fault meaning -- let's define the term "fault" meaning that you have to prove these defendants specifically did something that caused injury to your client.

MR. HUNTER: Only the two orders that have said the issues are causation and damages. And I also believe that --

THE COURT: But even if it's a Stage II trial, the issue still is, as I pointed out before, you've got to prove that tobacco smoke caused injury to your client.

MR. HUNTER: Right.

THE COURT: Secondhand tobacco smoke caused injury to your nonsmoking client. Just generally, where does it say that, instead of the defendants' tobacco smoke caused the injury?

MR. SILVER: I think that's implicit or inherent in the agreement, when these settling defendants agreed to proceed with Phase II trials, as distinguished from nonsettling defendants, who did not.

If we sued Liggett, a party that's not in

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this case, it would be a different burden on us in terms of all the elements of fault that we have to prove. But they are not in this case. That's a nonsettling defendant.

These four settling defendants, Your Honor, agreed to the parameters of these trials, and it was Phase II trials. And when there was any disagreement as to how that agreement was supposed to be interpreted, that's when the judges issued their orders.

So this is 11th-hour thinking about how to retrofit in fault into a case where there's never been fault.

MR. REILLY: It's not true, Your Honor.

MR. HUNTER: Well, let me just -- I haven't finished.

MR. REILLY: Paragraph --

THE COURT: Let him finish.

MR. HUNTER: I read Paragraph H on Page 11

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as you do, and it says that the settling defendants, which is these defendants, agree not to assert as a defense that any other released parties are responsible, in whole or in part.

Now, I think that means that it's joint and several liability.

THE COURT: I take that to mean that none of the other defendants who didn't settle are going to be blamed for this, right?

MR. REILLY: Exactly right. That doesn't provide anybody any relief from proving --

THE COURT: I mean, that's a good thing for the plaintiff, because normally the defendant would say: Well, yeah, people are supposed to offer proof on causation. But it doesn't say you don't have to prove it. I mean, it's so basic. I just can't imagine it hasn't come up at all.

MR. HUNTER: I mean, it's come up, Judge. I mean, Judge, it has. When Judge Kaye entered his order on the administration of the settlement, meaning what are we going to try --

THE COURT: Right.

MR. HUNTER: -- and he set forth very

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specifically, but by inclusion of the three issues to be tried, I think it excludes our need to try anything he didn't put in his order.

THE COURT: But, clearly, he said these are the only issues we're going to try.

MR. HUNTER: Right. But here's the way that -- and, believe me, there were months of argument, and this was fully briefed and went up to the Third District Court of Appeal, because they appealed Judge Kaye's ruling.

THE COURT: This one?

MR. HUNTER: Yes.

THE COURT: The October -- the one that says we're only trying Phase II questions?

MR. HUNTER: Yes. And we had oral argument on it. It was fully briefed.

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THE COURT: Yes.
MR. HUNTER: Now, the way that the plaintiff's brief --
THE COURT: Three years ago. Are you saying we still don't have a ruling?
MR. HUNTER: They said: Well, we don't have jurisdiction yet. It's still not a final order.

(Pause in proceedings.)
MR. HUNTER: Let me go on.
And the way it was argued was that eventually this settlement was reached between the parties after arm's length negotiations after three or five months of a trial; I forget how long it had gone on. And what it did, it essentially froze the position of the parties as it stood at that time.
The plaintiff had rested. The plaintiff had proved all of the issues that you're talking about, product identification, manufacture, negligence, all of the traditional theories of tort recovery, and even intentional wrongdoing, and the defendants had started to defend the case, and at that point in time, the parties reached a settlement.
And the argument that Mr. Perwin made to the Third District was essentially what the parties did is they said, okay, let's just stop this whole process; let's enter into an agreement that each case has to go forward individually. There is a presumption that these five diseases are caused by tobacco smoke, but that each individual person will go

through what would have happened under the trial plan that was existing, and that is, a Stage II trial, at which time the issues will be causation and damages.
And there were trial plans in place under the original Broin case, and that's why you see Judge Kaye's --
THE COURT: Certainly, if that was their intent, why wouldn't they include a clause in the settlement agreement that it is conceded that the tobacco corporation will not put on any evidence that disproves that secondhand tobacco smoke causes cancer?
MR. HUNTER: Oh, no. They have the right to do that. They have the burden to do that.
THE COURT: It didn't work. Why wasn't there a provision in the settlement agreement that said they would not do that; that it was no longer an issue?
MR. HUNTER: Because it is an issue.
THE COURT: Yes, of course, they never conceded.
MR. HUNTER: Right.
THE COURT: But you're arguing now that you don't have to prove that, you don't have to

prove that they caused it, just that the burden of proof shifted to them to disprove that

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secondhand smoke can cause cancer.
MR. HUNTER: Well, I mean, there's such -- there was such an abundance of proof that these four defendants or the other settled defendants were the overwhelming manufacturers of tobacco smoke on American airplanes. I mean, I don't think that anybody ever contemplated that somebody in an individual case would have to prove that when they started flying in 1972, they don't even know when they got lung cancer -- we didn't have -- there was joint and several liability up until 1978, so they're all joint and severally liable up until 1978, or '86. It was '86 that Fabre did away with joint and several liability.
So for those 16 years or so, they were jointly and severally liable, and then after that -- and different market shares were enjoyed by the companies at different times, and --
MR. SILVER: May I?
MR. HUNTER: -- and there was a big argument made about the fact it's an

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indivisible injury and you can't divide.
THE COURT: Let me see if I have this correct. You're saying the present state of law in the 11th Circuit is that we're only trying the Phase II questions, and Judge Siegel has defined them as the defendant has the burden of proof that secondhand smoke does not cause cancer. The plaintiff has the burden of proof that secondhand smoke caused his client's cancer, and the burden of proof, of course, if true, what damages she sustained.
MR. HUNTER: Yes.
THE COURT: And nobody has waived any defenses?
MR. HUNTER: Well, those --
THE COURT: Is that right?
MR. HUNTER: On those issues, there's -- I mean, they've waived comparative negligence, they've waived any Fabre defense, and the only defense is that it didn't -- secondhand smoke doesn't cause lung cancer and it didn't cause this lady's lung cancer. That's the only defense.
THE COURT: And her damages are not what she says. All right.

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MR. SILVER: May I just return, Your Honor, for one moment to the order that was entered by Judge Siegel on March 18th, 2002?
THE COURT: Yes.
MR. SILVER: That is an order which reads: Order on the Issues to be Tried in the Captioned Case, the Gail Routh Case.
THE COURT: Yes.
Which page?
MR. SILVER: On Page 5, Your Honor, Paragraph 1, Judge Siegel writes, as issue Number One: Can environmental tobacco smoke cause cancer, chronic sinusitis, et cetera? It

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doesn't say: Does the defendants -- does the environmental tobacco smoke from the defendants' products cause cancer?

Number two: Was environmental tobacco smoke a legal cause of injury, loss --

THE COURT: No. I understand. The way he's framing the issues, he has ignored specific elements of proof that the course 101 professors say you need to prove.

MR. SILVER: Because I think his interpretation was that we need not prove it under the terms of the settlement agreement.

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MR. REILLY: May I respond, Your Honor?

THE COURT: Yes, please.

MR. REILLY: Judge, you first have to determine whether or not the settlement agreement somehow altered this issue, this burden on the part of every plaintiff in every products liability case.

There is not some special -- as a general statement, there is not some special rules that apply only to cigarette manufacturers regarding burdens of proof in products liability cases.

The settlement agreement clearly does not carve out some special nonrequirement on the part of plaintiffs to prove product identification; in other words, that our products caused the injury to the plaintiff.

Now, the only place that plaintiffs could possibly find some relief from this burden would be either from the Ramos decision, which, of course, doesn't make any such exception from Judge Kaye's order, which never addresses this issue, or perhaps Judge Siegel's order.

Now, plaintiff's counsel just attempted --

THE COURT: What's your definition of a Phase II trial as provided in the settlement

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agreement?

MR. REILLY: Well, the settlement agreement doesn't say anything about Phase II trials. That's a complete misnomer, Your Honor.

THE COURT: The thing is in Judge Simons' orders, the two phases --

MR. HUNTER: Judge Kaye's order.

THE COURT: What's the definition of a Stage II trial?

MR. HUNTER: Causation and damages. Causation and damages.

MR. REILLY: You bet. And what is an element of causation? You have to identify that our product caused the harm.

And if you look at Judge Kaye's order, it takes ten minutes, you'll be puzzled, about how he got to his conclusions, but his conclusions never addressed, never even suggest that the plaintiffs don't have to prove that it was our products that were involved.

THE COURT: Judge Siegel's order does.

MR. REILLY: No, Judge Siegel's order doesn't, because you know what you have to look

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at, Your Honor? You have to look at what

issues were being presented to Judge Siegel, and then you'll understand Judge Siegel wasn't addressing whether or not plaintiffs had to prove that our products were involved. What was before Judge Siegel was the accuracy of Judge Kaye's order; that's all.

Judge Siegel -- see, what's happening here is they're trying to say that Judge Siegel was saying: "You know what? I'm not going to require that you prove the elements of causation," but that's not what was before Judge Siegel, and I'm happy to provide Your Honor with all of the briefing that was provided to Judge Siegel that resulted in him issuing this order, and none of it had to do with whether or not the plaintiffs did or didn't have to prove the product identification.

THE COURT: Was it ever raised in the arguments before Judge Siegel as to whether or not the plaintiff was required to meet this burden of proof?

MR. REILLY: No. It wasn't even addressed.

THE COURT: By anybody?

MR. REILLY: By anybody. That wasn't an issue on the table. What we were arguing about was whether or not he was going to follow --

THE COURT: Because it's so basic, everyone knew the plaintiff had to prove this.

MR. REILLY: Absolutely not. As a matter of fact, the only issue at the time being ruled on by Judge Siegel was whether he was going to follow Judge Kaye's ruling, which he found without legal value.

THE COURT: Except he reached the same conclusions.

MR. REILLY: He reached the same result, not the same conclusion.

THE COURT: You're right. For different reasons, affirmed for other reasons type stuff.

MR. REILLY: Type stuff, right.

Also, erroneous reasoning, as Your Honor had already pointed out.

However, if you look at what was presented to Judge Siegel -- that's sort of like saying: "You know what? Judge Siegel's order doesn't say anything about the fact that they have to prove that she has cancer." It doesn't, because it wasn't an issue.

THE COURT: Because you have to prove that -- the plaintiff has to prove that your product, therefore, that secondhand smoke caused her cancer. The assumption is she's got to prove she has cancer first.

MR. REILLY: You can make -- I mean, obviously, if Judge Siegel had attempted to set forth all the issues that could be raised during the course of this trial, we would have

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a much longer order than the order that he entered. But what was being presented to him at the time was simply: Are you going to follow Judge Kaye's order or not? And he said, "I'm not."

Judge Kaye's order reached certain conclusions, using what apparently was a line of legal reasoning.

THE COURT: How is it that in every one of these other cases, with the exception of Judge Rothenberg's case, when no proof was put in of the defendants' individual responsibility for having manufactured or put in the chain of commerce the product that the plaintiff claims caused his or her injury, you didn't get a directed verdict on that same ground?

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MR. HUNTER: They've raised that. No Judge has ever taken this argument seriously.

THE COURT: Wait a minute.

MR. REILLY: I'm sorry. Your Honor, can you say that again?

THE COURT: I'm saying, in every one of the other secondhand smoke cases that have been tried in this Circuit, and there are a couple of others, as I understand --

MR. HUNTER: Yes.

THE COURT: -- other than Judge Rothenberg, where there was some testimony about market share or something, how come you didn't get a directed verdict on any of those cases?

MR. REILLY: On certain cases, Your Honor, plaintiffs have gone on the stand and said, "When I was on my flights, this is what I saw people smoking."

So did we choose at that point to make an issue of whether or not that was sufficient evidence? No.

However, in this case --

THE COURT: Why wouldn't you have argued that merely because you saw someone back in the

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1970s smoking a Lucky Strike cigarette or a Camel, or whatever other brands they were, that's -- I can see an argument being made, if you're going to assume you have to prove fault, then that's not proof that it caused her cancer.

MR. REILLY: It's absolutely not proof it caused her cancer.

THE COURT: Well, why didn't you move for a directed verdict, then?

MR. REILLY: I did. I just did.

THE COURT: And they were denied in each of them?

MR. REILLY: I'm sorry. Are you asking me in some other case?

THE COURT: Yes. The other cases.

MR. REILLY: In other cases, for example, in the French case, Mr. Weinstein put on evidence of what brands were being smoked on board airplanes on which the plaintiff flew,

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and he put in evidence regarding who manufactured those brands.

THE COURT: But I've come to know you well enough, though, that you would have argued immediately that just because there were people

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smoking them at that time, doesn't mean those cigarettes caused her cancer.

MR. REILLY: And I did --

THE COURT: It's a leap of faith.

MR. REILLY: And I did, and that issue is now on appeal to the Third DCA, because you know what Judge Smith said? She said, "I can't believe it's not in the settlement agreement somewhere." I'll provide you with a transcript.

THE COURT: Me, too.

MR. REILLY: But you know what? Today, if you ask Judge Smith, I'll bet she'll say to you: "I don't know where it is," because it's not there. She said, "I just can't believe that somebody didn't deal with it." But, in fact, they did deal with it.

THE COURT: That's what this whole discussion for the last 40 minutes has been. I can't believe this hasn't been dealt with specifically.

MR. REILLY: You know what? It has been dealt with. Paragraph 11d -- 11d or 12d deals with it. It says all other burdens remain the same.

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But, you see, if the plaintiff chooses -- Your Honor, the State of Florida has provided a method for plaintiffs to prove their case, where things like this arise. It's called market share. You establish what the market share is. There are about three elements.

THE COURT: I understand. When you've got a product that is so universally used and you can't tell which of the many manufacturers made it, you ascribe a kind of percentage of responsibility for any loss that you can prove resulting from the use of the generic product.

MR. REILLY: The plaintiffs have two choices in these cases. They either can put on real evidence of what brands the plaintiff saw being smoked, in other words, what smoke she was actually inhaling, or they could attempt a market-share approach --

THE COURT: I understand.

MR. REILLY: I was asked to wait a moment by the court reporter.

THE COURT: You're saying that neither one occurred in this case.

MR. REILLY: Sure.

THE COURT: At a minimum, I'm going to

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take it under advisement. I'm not going to direct a verdict at this point on that issue. It's something I'm going to think on and see if I can find some more orders that have been entered on somewhere in this Circuit.

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MR. REILLY: If you would like anything more from us, we can provide it.
MR. ENGRAM: Your Honor, it's especially pertinent in this case because Mrs. Routh flew those three and a half years internationally, and we don't make Dunnhills and the other cigarettes that would have been smoked on those flights by citizens of foreign countries.
THE COURT: They flew two ways, sir.
MR. ENGRAM: I understand.
MR. REILLY: I would point out to Your Honor that Judge Siegel, in his order, said, "General causation remains an issue and a trial of this case will not be only a Stage II trial."
THE COURT: All right. I understand. My ruling simply is I'm going to defer.
MR. REILLY: Thank you, Your Honor.
THE COURT: On that ground. The other grounds I'm going to deny.

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What else do we need to do now?
MR. REILLY: Your Honor, I need to renew my motions for mistrial. I need to renew any other motions that I have --
THE COURT: In general, every single prior motion you made on the ground that you don't want to waive them?
MR. REILLY: Correct.
THE COURT: You have not waived them, sir.
MR. REILLY: Thank you, Your Honor.
MR. GERAGHTY: And, Your Honor, just so the record is clear, I want to make it clear that Mr. Reilly was speaking on behalf of all the defendants.
THE COURT: That was stated at the beginning. Unless stated otherwise, he talks for everyone.
MR. GERAGHTY: No, no. We won't agree with that, Your Honor.
MR. REILLY: He will, but the rest of them won't.
THE COURT: What else? You need some time to get your materials out of here.
MR. REILLY: Thank you, Your Honor.
THE COURT: All right. 8:30 tomorrow. I

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have an 8:00. I may be a few minutes late, but I'll try and be on time.
(A brief recess was taken, after which the following proceedings were held:)
THE COURT: Mr. Reilly was indicating who he expects to call tomorrow.
MR. REILLY: Yes. Dr. Villa and Dr. DePrima. Now, let's hear whatever objection we have.
THE COURT: Sure. You expect, given the direct and cross that you know of on those two witnesses, that they'll take the whole day?
MR. REILLY: It is going to take quite a while to put Dr. DePrima on direct, and based on Mr. Hunter's stacks of cross materials for Dr. Villa, I'm confident he will take some

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time.
THE COURT: Okay.
MR. HUNTER: Well, here's the thing I don't know. If they're limited to three witnesses on causation, I would like to hear who they consider to be their three causation witnesses, because Dr. DePrima is solely on causation, so he would be the fourth witness.
MR. REILLY: No. Dr. DePrima will not

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address causation.
MR. HUNTER: Well, then, I'm going to have a lot of objections on that, because if he doesn't address causation --
THE COURT: Let's wait and hear what he says.
MR. HUNTER: -- he's irrelevant. Well, I know exactly what he said. I took his deposition for hours and hours.
MR. REILLY: He's no more related to causation than Dr. Sleater.
THE COURT: Just give me a thumbnail of what you expect he will opine.
MR. REILLY: He's going to say radiographically this looks like bronchioaleolar carcinoma, period.
THE COURT: Not causation, but, rather, whether the disease is one or the other.
MR. REILLY: Just like Dr. Sleater.
THE COURT: Okay.
MR. HUNTER: That is their causation argument. He's saying since it's BAC, it's not tobacco-related.
THE COURT: I know what you're driving at. If it's one, the evidence isn't caused by

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tobacco smoke; if it's the other, it's caused by genetic problems, and if it's the other, it's caused by secondhand smoke.
MR. HUNTER: Yes. Their whole defense is it's BAC, BAC, not adenocarcinoma. That's causation.
THE COURT: Your witness, at least one or two of them, says it is one and not the other type of cancer.
MR. HUNTER: Yes. That's the major issue in this case.
THE COURT: The doctor also opined on the cause of her condition.
MR. HUNTER: Dr. Sleater.
MR. REILLY: Dr. Sleater is exactly identical. Their pathologist, Dr. Sleater, from Mission St. Joseph, did exactly what Dr. DePrima is going to do, which is -- he didn't address whether or not the disease was caused by smoking or secondhand smoke; he merely said, "In my opinion, this is adenocarcinoma."
THE COURT: I understand. Besides those two, you think that will take the whole day?
MR. REILLY: I think so, Your Honor. It's

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very hard to predict.

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THE COURT: That's all right. Assuming it does, and we can get more in, would you have more to bring in in the way of depositions, videos, documents that you could put on tomorrow?

MR. REILLY: No. I might have -- you know, we're going to show about five minutes of Dr. Messino, so do I think that's going --

THE COURT: That's not going to use up much time?

MR. REILLY: Right.

MR. HUNTER: Well, again, I'll object to that. But could I hear, Judge, if we might, who all their witnesses are going to be so I finally know?

THE COURT: Right, assume on Tuesday that we start.

MR. UPSHAW: Like you did for us.

MR. HUNTER: You knew who all my witnesses were.

MR. REILLY: Wednesday, of course, determines exactly how I separate them out or how we separate them out.

THE COURT: I just need to know how much

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time you're going to need to put on your case.

MR. REILLY: Yes. I think if we go Tuesday, Thursday, we should be able -- if we either have half a day Wednesday or -- see, what it will do is, if we're not going to work Wednesday -- be patient with me, because if we don't work Wednesday, then -- see, all our people are from out of town. So what I would be inclined to do, if I knew I was going to work not at all on Wednesday, then I would bring three people -- or is it four people, on Tuesday, and just tell you we have to stay late if it takes late, late, late. If you tell me we're going to work part of the day on Wednesday, then I'd have, I think it's three people on Tuesday, and one person on Wednesday, because that way I don't have --

THE COURT: Assume you get them all in one way or the other, we work Wednesday or work late Tuesday, when will you finish?

MR. REILLY: Friday morning. Friday morning we would have one witness, a short witness Friday morning, and the witness will be Mancil Milligan. If I could bring Dr. Milligan earlier, I would, but he's unavailable.

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THE COURT: That's all right. Talk to me about rebuttal. What do you anticipate in rebuttal?

MR. HUNTER: Well, I mean, they're loading up so many of these witnesses on causation, Judge. They just mentioned Dr. Jenkins.

THE COURT: Nobody gives simple answers.

MR. REILLY: Dr. Jenkins doesn't address causation. He's not even a medical doctor.

THE COURT: Nobody gives simple answers to simple questions.

MR. HUNTER: I will probably bring Dr.

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Roggli, and I will make an impassioned plea that you allow me to show these Broin videos.

THE COURT: Besides that, anything else?

MR. HUNTER: I would say half a day.

THE COURT: We can finish Friday, is what you're saying?

MR. HUNTER: Yes.

THE COURT: All right.

MR. HUNTER: But, Judge, they haven't told me who all these witnesses are.

THE COURT: They're going to.

MR. REILLY: Your Honor, they know every witness.

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MR. HUNTER: Then I wouldn't ask. I don't know.

MR. REILLY: Then you need to talk to him, because he knows.

MR. SILVER: I know the three that you designated as causation.

THE COURT: Miss Reporter, I order you not to record their byplay between them.

MR. REILLY: I've already identified Dr. Villa and Dr. DePrima. I told you Dr. Davies is coming. I told you Dr. Jenkins is coming, who is not a medical doctor. I've told you that Dr. Milligan is coming, who's not a medical doctor. Dr. Jones is coming, the ENT.

THE COURT: That's fine. My concern is that we're going to spill over to the week following, and it looks like we will, and I'd never start a closing argument in this case after half a day of testimony or something like this, so we're going to go over at least until Monday, so I can probably accommodate you.

MR. REILLY: I'll tell you what I think. I can't imagine what Dr. Roggli would comment and say that would be true rebuttal, and I

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can't think of any testimony they would have that would be rebuttal. And, quite honestly, depending upon what we do on Thursday, if we only have one witness that takes an hour and a half, two hours on Friday, I don't know why we wouldn't do closing arguments on Friday. I'll be honest, that's my true belief.

THE COURT: Okay. I hear you. Tomorrow morning we'll come back to it.

Thank you. Have a good evening.

MR. UPSHAW: You, too, Your Honor.

MR. SILVER: Your Honor, I'm advised the the following Monday may be a legal holiday.

THE COURT: It's Columbus Day.

(Thereupon, the proceedings were adjourned at 3:55 p.m.)

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